IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent.

LANCE TOUCHSTONE,

Real Party in Interest.

No. S245203

SAN DIEGO COUNTY DISTRICT ATTORNEY
INTERVENOR BRIEF

Fourth Appellate District, Division One, Case No. D072171
San Diego County Superior Court, Case No. SCD268262
The Honorable Kenneth K. So, Judge

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INTRODUCTION

In question number five, this Court posed the question, "... may the trial court, acting pursuant to statutory and/or inherent authority to control the litigation before it and to insure fair proceedings, and consistently with 18 U.S.C. section 2702(b)(3), order the prosecution to issue a search warrant under 18 U.S.C. section 2703 regarding the sought communications?

To resolve this question, the People must necessarily address the threshold issue of whether the Stored Communications Act applies to Facebook. If it does not apply, then this court need not reach the search warrant question, as Touchstone can subpoena the records he seeks, and the search warrant issue would be moot. But if the SCA does apply, a search warrant would still not be the appropriate vehicle to seize non-criminal third-party records, as such a warrant would violate both statutory and constitutional law for failing to be supported by probable cause of a crime.

Congress adopted the Stored Communications Act (the "SCA" or "Act") in 1986, to give Fourth Amendment-like protections to citizens who used email services and third-party computer processing services which were available at the time. But Congress could not have predicted how drastically technology would develop over 30 years, including the advent of social media platforms like Facebook. Because of the SCA's archaic definitions of which computer services apply, Facebook does not qualify for the protections of the Act.

In April of this year Facebook Chairman and Chief Executive Officer Mark Zuckerberg testified before Congress and gave clarity and detail to what Facebook does with user data, both in terms of the services it provides users, the services it provides advertisers, and the artificial intelligence (A.I.) tools it employs to actively screen and remove harmful content.

It is now apparent that the SCA does not apply to Facebook. In fact, applying the SCA to Facebook would prohibit it from disclosing to law enforcement any criminal conduct it deliberately uncovers, unless it meets the Act's definition of an emergency. While a tortured application of the SCA to Facebook may advance its business interests, it comes at the cost of public safety.

Intervenor San Diego County District Attorney (hereinafter "the People") moves this court to augment the record to include Mr. Zuckerberg's testimony, as well as Facebook's terms of service and data policy. This is necessary since neither Facebook nor Lance Touchstone have provided any facts regarding this issue. Facebook failed to meet its initial burden of proof that the SCA applies, and Touchstone avoids the issue altogether. Looking at the relevant California case law, this gift of presumption is commonly given to Facebook. This Court must address this issue fully so that lower courts can have a definitive framework to hold litigants to their respective burdens and give clarity to the SCA's meaning. It is also important because if the SCA does not apply, the question of whether it infringes on Touchstone's constitutional guarantees is moot.

If the SCA does not apply, then the corresponding state law controls, including the provisions which govern electronic communications. State law increases protections from government intrusion into electronic communications, and generally permits individuals such as Touchstone to lawfully subpoena records. Moreover, because search warrants require probable cause of a crime, any search warrant issued to seize records belonging to non-criminal third parties would be illegal. The very heart of our Fourth Amendment prohibits such illegal searches and seizures, unsupported by probable cause that a crime has been committed. Such a search warrant would also be prohibited by state law and violate the

separation of powers provision of the California Constitution. (Cal. Const. art. III, § 3.)

Moreover, during the stay of Touchstone's underlying criminal case, the victim expressly objected to the disclosure of his Facebook content under the Victim's Bill of Rights. (Cal. Const., art. I, § 28, subd. (b), par. (5).) He therefore also has a due process right which must be balanced against any constitutional guarantees Touchstone has as a criminal defendant.

Because counsel for Touchstone obtained permission from the Superior Court to seal portions of her declaration, filed in opposition to Facebook's motion to quash, the People have been denied access and are unable to balance Touchstone's constitutional rights against the victim's rights, along with any statutory protections over electronic communications (if they apply).

In sum, this Court should find that the SCA does not apply to Facebook and deny Facebook's motion to vacate the Superior Court's order. Additionally, this court should address and define which of the victim's Marsy's Law rights apply and remand the matter to the Superior Court to balance those rights against Touchstone's rights. In this regard, this Court should also hold that Touchstone is required to disclose all information which he believes supports disclosure, if he wishes to continue to seek enforcement of the subpoena.

ARGUMENT

I.

THE SCA DOES NOT APPLY TO FACEBOOK BECAUSE (1) IT DOES NOT PROVIDE "ELECTRONIC STORAGE" AS DEFINED BY THE SCA, AND (2) IT MAINTAINS AUTHORITY TO ACCESS USER CONTENT BEYOND WHAT IS REQUIRED TO PROVIDE ITS SERVICES

A. Facebook Has Failed to Meet Its Initial Burden of Proof That the SCA Applies

Generally, the movant seeking to quash a subpoena duces tecum has some burden to show the impropriety of the subpoena. If a privilege or right to confidentiality is asserted, then the asserting party has the initial burden of proving the privilege or right exists. (*Bank of Am., N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1100 [in a motion to quash or modify SDT, movant-claimant must establish initial facts to show attorney-client privilege exists]; *In re Muszalski* (1975) 52 Cal.App.3d 475, 483 [burden of demonstrating need of confidentiality for documents contained in prisoner's file maintained by the Department of Corrections rests on the Department]; *People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 420 [claimant of the confidential marital communication privilege has the burden to prove, by a preponderance of the evidence, the facts necessary to sustain the claim]; *In re Willon* (1996) 47 Cal.App.4th 1080, 1092 [reporter has initial burden to show they were protected by the newsperson's shield law].)

Similarly, the SCA prohibits third-party providers of certain electronic services from divulging communications without the users consent, unless a narrowly-tailored exception applies. This is analogous to the attorney-client privilege, in which the attorney lacks the authority to waive the privilege but must claim the privilege unless a narrow exception applies. (Evid. Code, §§ 954-962.) Facebook bears the initial burden of

proof, just as an attorney would if he or she were to claim the privilege on behalf of a client.

In support of its motion to quash, Facebook provided copies of various prior court orders and decisions, which held that the SCA applied to Facebook. This is a question of fact, not law, and can be relitigated. (See *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, 863 (*Juror Number One*).) For an issue to be precluded from relitigation, the party against whom preclusion is sought must have been a party to or in privity with a party to the prior proceeding, which is not the case here. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077, *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.) Facebook's motion to quash is unsupported by any evidence, and on that ground, should be denied.

Facebook may argue that Touchstone has conceded this issue by failing to contest it in the proceedings below. It is true that Facebook has enjoyed a gift of presumption, in one form or another, in prior cases. In *Facebook, Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245, 1249 (*Facebook I*), this Court noted, "Defendants implicitly accepted providers' reading of the Act and their conclusion that it bars providers from complying with the subpoenas." In *Juror Number One, supra,* a juror claimed the protections of the SCA over his Facebook content. The court turned to *Crispin v. Christian Audigier, Inc.* (2010) 717 F.Supp.2d 965 (*Crispin*) for guidance but found little. The court in *Juror Number One* stated, "The findings in *Crispin* were based on the stipulations and evidence presented by the parties in that case. The court noted that the parties 'provided only minimal facts regarding the three third-party entities that were subpoenaed.' [Citation]." (*Juror Number One, supra,* 206 Cal.App.4th at p. 863.) With no facts on the issue, the court could not determine whether the SCA applied to Facebook (ultimately, the SCA did not apply because it was the user who was compelled to produce). (*Ibid.*)

The People, as an intervening party in this case, do not concede this factual issue, nor do we accept Facebook's unsupported representations that they fall within the ambit of the SCA. The People assert that Facebook does not meet the definition of a qualified provider, as outlined below; thus, the SCA does not apply.

B. Since Neither Facebook Nor Touchstone Have Provided Any Evidence Regarding the Applicability of the SCA, the People Respectfully Request This Court Take Judicial Notice of the Exhibits Described Below

The People have contemporaneously filed a motion to augment the record, requesting that the exhibits listed below be admitted. The People incorporate by reference that motion, and refer to the Intervenor's Exhibit in this brief consistently.

On April 10, 2018 (after *Facebook I* was argued and submitted), the Senate Committee on the Judiciary and the Senate Committee on Commerce, Science, and Transportation held a video-recorded hearing entitled: "Facebook, Social Media Privacy, and the Use and Abuse of Data," and published the video on their official website <https://www.judiciary.senate.gov/meetings/facebook-social-media-privacy-and-the-use-and-abuse-of-data> (as of July 24, 2018) (hereinafter "the Senate hearing," Intervenor's Exh. B). Chairman and Chief Executive Officer of Facebook, Mark Zuckerberg, testified at length. The Washington Post published a transcript of that hearing on its website <https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/?utm_term=.d6289664fdb8> (as of July 24, 2018). (Intervenor's Exh. B-1.)[1]

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[1] The transcripts referenced in Intervenor's Exhibits A-1 and B-1 are not being offered as evidence, but merely to facilitate review of the recordings pursuant to California Rules of Court, rule 2.1040, subdivision (b).

On April 11, 2018, the House Committee on Energy and Commerce held a similar recorded hearing and published both the video recording and a preliminary transcript on their official website <https://energycommerce.house.gov/hearings/facebook-transparency-use-consumer-data> (as of July 24, 2018) (hereinafter "the House hearing," Intervenor's Exh. C, and C-1, respectively.)

A court may take judicial notice of a congressional hearing. (Evid. Code, § 452 et seq.; *Marocco v. Ford Motor Co.* (1970) 7 Cal.App.3d 84, 88–89. The testimony of Facebook Chairman and CEO Mark Zuckerberg in both the Senate and House hearings are admissible as party admissions. (Evid. Code, § 1220.) Mr. Zuckerberg's testimony is highly relevant, since he describes in detail how Facebook works, the terms of service, and how Facebook accesses user data to self-regulate (in the absence of regulatory legislation). (Evid. Code, §§ 350, 351.)

The People also request that this Court take judicial notice of Facebook's Terms of Service <https://www.facebook.com/legal/terms> (Intervenor's Exh. D) and Data Policy <https://www.facebook.com/about/privacy/update> (as of July 24, 2018) (Intervenor's Exh. E) as items that are not reasonably subject to dispute and can easily be verified as accurate via Facebook's public website. (Evid. Code, § 452, subd. (h).) As stated by the court in *Juror Number One, supra,* 206 Cal.App.4th at p. 863, "... we are unable to determine whether or to what extent the SCA is applicable... we have no information as to the terms of any agreement between Facebook and Juror Number One that might provide for a waiver of privacy rights in exchange for free social networking services."

While generally not permitted, there is no prohibition from appellate courts taking judicial notice of matters not raised in the trial court. (See *People v. Preslie* (1977) 70 Cal.App.3d 486, 492 ["... informal requests for augmentation made after a reasonable time has expired from receiving the

record on appeal, and particularly as late as those contained in briefs, will be denied absent a strong showing of unusual or unavoidable circumstances giving rise to the delay"].) Augmentation of the record at this stage by the People is reasonable and necessary. The People were not served with Facebook's motion to quash. Counsel for Touchstone filed critical portions of her declarations in opposition to Facebook's motion to quash under seal.[2] The People did not have a reasonable basis to intervene and fully address all the issues until this court granted review. Lastly, this Court has little-to-no facts in which to fully address whether the SCA applies to Facebook. If it does not, an as-applied challenge to its constitutionality is moot.

"The preponderance of authority holds that a court entertaining a proceeding in mandate may consider 'all relevant evidence, including facts not existing until after the petition for writ of mandate was filed…' [s]uch consideration is particularly apt where, as here, the effect of the additional evidence may be to validate an action that would otherwise have to be set aside." (*Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 894–95, citations omitted.) If the SCA does not apply, then the trial court's denial of Facebook's motion to quash need not be set aside. The circumstances all support this Court taking judicial notice and accepting the evidence into the record.

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[2] The People were not served with the record on appeal. Because the People are uncertain if these motions are included in the appellate record, the following exhibits are referenced: Facebook's motion to quash and vacate subpoena duces tecum (Intervenor's Exh. H); declaration of Christian Lee in support of motion to quash and vacate (Intervenor's Exh. I); Touchstone's opposition to Facebook's motion to quash (Intervenor's Exh. J); request to seal and redact portions of defense counsel's declaration in opposition to Facebook's motion to quash (Intervenor's Exh. K); Redacted defense counsel's declaration in opposition to Facebook's motion to quash (Intervenor's Exh. L); Facebook's reply in support of motion to quash and vacate (Intervenor's Exh. M).

These recent Senate and House hearings illuminated many details surrounding Facebook which were either unclear or unknown. It was perhaps this lack of knowledge that encouraged Touchstone and the parties in *Facebook I*, *Juror Number One,* and *Crispin* to either concede the issue or avoid it altogether. The People respectfully request that this Court accept the above-referenced exhibits into evidence and fully address the applicability of the SCA to Facebook.

C. Electronic Communications Stored by Facebook Are Not Subject to the SCA Because Content Is Not Stored "Temporarily," "Intermediately," or for "Backup" Purposes

For the SCA to cover communications possessed by providers of Electronic Communication Services (ECS), the sought communications must be held in "electronic storage." (18 U.S.C. §§ 2702(a)(1), 2703(a).) The definition of what constitutes "electronic storage" is limited to "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof," and any storage of such communication "for purposes of backup protection of such communication." (18 U.S.C. §§ 2510(17)(A)-(B).) While this definition seems very narrow by today's standards, it describes very accurately the way email providers transmitted messages in 1986, the year Congress adopted the SCA.

At the time the SCA was adopted, emails were sent between users through a fragmented delivery system. Emails were transmitted between dial-up service providers, and messages were temporarily stored on the email provider's server before it was ultimately downloaded by the recipient, onto their own computer. (Robison, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act* (2010) 98 Geo. L.J. 1195, 1205-1206.) Thus, the SCA's definition of "electronic storage" accurately describes the technology of the time: email servers held the

email communication only temporarily and intermediately (i.e., between sender and recipient).

Facebook operates in a vastly different manner. Unlike primitive email systems which served as simple couriers of data, Facebook is the host of user content and doles out access to other users. Users upload content and have controls over who to share that content with, within the limitations of the Facebook platform. (See Intervenor's Exh. E ["Things you and others do and provide"].) Facebook also possesses a license over the content users upload. (See Intervenor's Exh. D ["... you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license..."].) As stated by Mr. Zuckerberg, "You clearly need to give Facebook a license to use it within our system... or else the service doesn't work." (Intervenor's Exh. B at timestamp 5:20:57; Intervenor's Exh. B-1 at p. 138.) Because Facebook is a host of content that also serves as a platform for applications, the license is necessary for Facebook to provide its services. A simple courier needs no such rights.

When Facebook retains data, it is not for "backup" protection. Uploaded content held by Facebook serves a larger purpose — it is analyzed and used to provide users a "personalized experience," a promoted feature of the platform. (See Intervenor's Exh. D ["We use the data we have – for example, about the connections you make, the choices and settings you select, and what you share and do on and off our Products – to personalize your experience."].)

Also, there is a specific feature which allows users to download all their content so that *the user* becomes the holder of backup data. As explained by Mr. Zuckerberg in the House hearing, "We have a Download Your Information tool. We have had it for years. You can go to it in your settings and download all of the content that you have on Facebook."

(Intervenor's Exh. C at timestamp 2:36:40; Intervenor's Exh. C-1 at p. 117.)

D. If Facebook Is a Remote Computing Service Provider, the SCA Does Not Apply Because Facebook Retains a Right to Access User Content Beyond What Is Necessary to Provide Services or Storage

The SCA also applies to Remote Computing Service (RCS) providers who store electronic communications solely for the purpose of providing storage or computer processing, *if the provider is not authorized to access the contents* of any such communications for the purpose of providing any services other than storage or computer processing. (18 U.S.C. §§ 2702(a)(2)(B), 2703(b)(2)(B).) In 1986, computer processing and storage was prohibitively expensive to conduct in-house, and organizations such as hospitals, banks, and the like would outsource computer processing to third-party service providers. (Robison, *supra*, at p. 1207, citing Sen. Rep. No. 99-541, 2d Sess., pp. 10-11 (1986).) Again, Facebook bears no resemblance to the remote computing services that existed then.

To the extent Facebook provides applications for users, it may qualify as a provider of computer processing. However, because of the license Facebook possesses over user data, it fails to meet the SCA requirement that it not be authorized access to the content beyond storage or processing. Facebook's license over user data is clearly the consideration users must give in exchange for the ability to use Facebook. (Intervenor's Exh. D ["Your Commitments to Facebook and Our Community"].) When asked whether a user can modify terms of service, Mr. Zuckerberg stated, "... I think the terms of service are what they are." (Intervenor's Exh. B at timestamp 2:46:30; Intervenor's Exh. B-1 at p. 61.)

One central way in which Facebook uses this license is to collect raw data from users for targeted advertising. As explained by Mr. Zuckerberg in the Senate hearing,

> What we allow is for advertisers to tell us who they want to reach, and then we do the placement. So, if an advertiser comes to us and says, "All right, I am a ski shop and I want to sell skis to women," then we might have some sense, because people shared skiing-related content, or said they were interested in that, they shared whether they're a woman, and then we can show the ads to the right people without that data ever changing hands and going to the advertiser.

(Intervenor's Exh. B at timestamp 2:18:03; Intervenor's Exh. B-1 at p. 51.) As stated by the court in *Juror Number One, supra,* 206 Cal.App.4th at p. 862 (citing Robison, *supra,* at pp. 1212–1214), "... if the service is authorized to access the customer's information for other purposes, such as to provide targeted advertising, SCA protection may be lost." Target advertising is a revenue generating practice which forms the backbone of Facebook's business model. When Facebook accesses user content to provide target advertising, it is not accessing the content to provide a service to the user. It instead provides a service to the advertiser. As such, the SCA does not apply to Facebook.

And while users have some choices in their settings regarding targeted advertising, they are limited to the choices Facebook provides. Facebook still retains the authority to access content for purposes outside of any user related services. (See, generally, Intervenor's Exhs. D & E.) The license gives Facebook authority to access user content in a manner which disqualifies it from the SCA. Whether Facebook ever accesses (or collects) the data is immaterial – the SCA only requires *authority* to access in order to place a provider outside of the Act's protections.

As explained below, one example of Facebook's authority to access communications which disqualifies it from the SCA is its practice of using

A.I. screening tools to actively scan user content for harmful content and remove it before another user can view it. Facebook retains the right to do this, and the user cannot stop it via user settings.

E. Facebook Cannot Meaningfully Self-regulate or Police Harmful Content Without Violating the SCA

Mr. Zuckerberg described in his Senate testimony the methods Facebook uses to seek out and eliminate harmful content:

> Today, as we sit here, 99 percent of the ISIS and Al Qaida content that we take down on Facebook, our A.I. systems flag before any human sees it. So that's a success in terms of rolling out A.I. tools that can proactively police and enforce safety across the community. Hate speech — I am optimistic that, over a 5 to 10-year period, we will have A.I. tools that can get into some of the nuances — the linguistic nuances of different types of content to be more accurate in flagging things for our systems.

(Intervenor's Exh. B at timestamp 1:23:49; Intervenor's Exh. B-1 at pp. 19-20.)

Facebook not only intends to continue with A.I. screening tools, but it also plans to expand them. The terms of service, including the license that Facebook possesses over user content, is the legal basis by which they can police content in this manner. However, if the SCA applies to Facebook, it cannot report most criminal activity it deliberately uncovers to law enforcement without violating the Act.

The SCA permits a provider to disclose communications that pertain to the commission of a crime if they were inadvertently obtained. (18 U.S.C. § 2702(b)(7).) If evidence of a crime was discovered pursuant to A.I., it would be a deliberate and not inadvertent discovery. Disclosure in this instance may expose Facebook to liability.

Another exception permits good faith disclosure regarding emergencies involving danger of death or serious injury, if immediate

disclosure is necessary. (18 U.S.C. § 2701(b)(8).) Public policy demands that, if Facebook casts such a wide net to catch what might fit its own definition of harmful content then they cannot, in good faith, turn a blind eye to harmful criminal conduct that may fall short of the emergency standard, and withhold law enforcement disclosure to avoid liability.

For example, if Facebook were to use an A.I. tool to actively scan for online opioid pharmacies who target minors, and deliberately discovered the unlawful sale of 100 opioid pills to one 16-year-old user, that may constitute an emergency of death or serious injury, since that minor would have the potential to either personally ingest a fatal level of the drug or facilitate another minor's ability to do so. Immediate disclosure to law enforcement would be lawful. However, if that same A.I. tool discovered that the pharmacy unlawfully sold one opioid pill to 100 separate 16-year-old users (assuming they are of an average therapeutic dose), disclosure to law enforcement would be prohibited under a conservative interpretation of what constitutes an emergency under the SCA definition. (See, generally, Exhibit C at 3:07:18; Exhibit C-1 at pp. 144-145.) This absurd and harmful result would be a consequence of applying ill-fitting legislation to Facebook. Applying the SCA to Facebook has the potential to chill reasonable and necessary reporting to law enforcement to protect the public.[3] While Facebook could remove the content and ban the users and the pharmacy from its platform, those steps

[3] Facebook did not report Mr. Kogan's sale of large amounts of user data to Cambridge Analytica to the Federal Trade Commission (FTC) when they became aware of it in 2015. Facebook did not believe they were required to report, based upon their interpretation of the terms of the 2011 FTC consent decree. (Intervenor's Exh. C at timestamp 4:17:30; Intervenor's Exh. C-1 at p. 189.) It is therefore reasonable to believe that Facebook would interpret the SCA conservatively and likewise fail to disclose the content described in this hypothetical scenario.

would not be sufficient to protect the public if Facebook did not also disclose the same content to law enforcement.

Lastly, the SCA permits a provider to disclose content if it is incidentally necessary to provide the service or to protect the provider's rights or property. (18 U.S.C. § 2702(5).) However, any social media platform could manipulate this exception to swallow the general rule of non-disclosure by requiring users to grant a license over all content. Similarly, what constitutes as a protection of a right or property cannot include matters described in other enumerated exceptions, since it would render those other exceptions meaningless. (*Scher v. Burke* (2017) 3 Cal.5th 136, 146 [enactments should be construed to avoid any provision superfluous].) In this regard, discovery of crime or emergency situations cannot be considered a pursuit of protection of Facebook's rights or property.

In conclusion, the SCA does not apply to Facebook. Facebook is not an ECS because user content stored by Facebook does not meet the strict definition of "electronic storage." To the extend Facebook is an RCS, it is disqualified from the Act because of the license it possesses over user content, which permit them to use that data for purposes beyond what is necessary for user services, such as A.I. screening for harmful content.

II.

STATE LAW GENERALLY PERMITS TOUCHSTONE TO SEEK A SUBPOENA; A WARRANT WOULD BE BOTH UNECESSARY AND UNLAWFUL

A. The State Act Permits Touchstone to Seek a Subpoena for the Records

If the SCA does not apply to Facebook, then Penal Code section 1546.1, the state law governing electronic communications, would apply. In contrast to the SCA, the prohibitions against production of electronic

communications mainly apply to government entities and has a much broader definition of what constitutes an ECS provider.

Penal Code section 1546.1, subdivision (b)(4) prohibits a government entity from compelling the production of electronic communications from a service provider via a subpoena for the purpose of investigating or prosecuting a criminal offense. That same section also prohibits such a subpoena if it would otherwise violate state or federal law.

Touchstone is a criminal defendant, not a government entity as defined by Penal Code section 1546, subdivision (i). Touchstone is also not investigating or prosecuting a criminal offense, but rather, seeking materials to defend a criminal prosecution. If the SCA does not apply, then a defense subpoena would not violate federal law. Touchstone would merely need to satisfy the general state law requirements surrounding the subpoena process.

Facebook would qualify as an "electronic communication service" (ECS) provider under state law, since all that is required is that Facebook provide a service which allows users the ability to send or receive messages. (Pen. Code, § 1546, subd. (e).) Unlike the SCA, this definition "includes," but is not limited to, services that act as an intermediary. (*Ibid.*) Users send content to Facebook, who then shares it with others at the user's direction. Facebook qualifies as an ECS provider under state law.

However, because the victim has objected to the discovery of his Facebook content pursuant to his constitutional rights as a victim (see Intervenor's Exhs. E & F, Cal. Const., art. I, § 28, subd. (b), par. (5)), this court will need to determine what impact those rights have in relation to Touchstone's ability to subpoena the private Facebook messages. That issue is discussed in the subsequent sections.

B. State Law Prohibits the People from Compelling Facebook to Produce Electronic Communications Without a Warrant Supported by Probable Cause

State law does not permit the issuance of a warrant for impeachment evidence or other evidence which would support a claim of self-defense. Penal Code section 1546.1 expressly enumerates how a government entity may compel the production of electronic communications from an ECS provider. Relevant to this case, Penal Code section 1546.1, subdivision (b)(1) requires that the government entity obtain a warrant pursuant to Chapter 3 of the Penal Code (commencing with section 1523). That chapter does not authorize the issuance of a warrant to search for materials which might be favorable to a defendant. It contains specifically enumerated and limited circumstances under which search warrants may be obtained, all revolving around the gathering of evidence that a crime has occurred or is about to occur.

"[A]ny acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis,* are in excess of jurisdiction... [Citation.]" (*People v. National Automobile & Casualty Insurance Co.* (2000) 82 Cal.App.4th 120, 125; see also *In re Harris* (1993) 5 Cal.4th 813, 838-839.) It is true that a trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. (*People v. Cox* (1991) 53 Cal.3d 618, 700, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421.) However, a court does not have the inherent authority to issue a warrant which would be in excess of its jurisdiction.

C. Since the SCA Yields to State Law, a Warrant Could Not Issue Even If It Did Apply to Facebook

Assuming, *arguendo*, that the SCA applies, a warrant or subpoena on behalf of the People would still be prohibited since the SCA expressly yields to state law. In a matter before a state court, the SCA only permits governmental agencies to compel disclosure from an ECS provider of communications held for 180 days or less via state warrant procedures. (10 U.S.C. § 2703(a).) Regarding ECS communications held longer, or any communications held by an RCS provider, any court order for disclosure shall not issue if prohibited by state law. (18 U.S.C. § 2703(d).)

State law prohibits disclosure in this instance. Penal Code section 1546.1 does not permit a government agency to compel the production of electronic communications without a warrant supported by probable cause that a crime has been committed, a wiretap, or an order for electronic reader records (Pen. Code, §1546.1, subd. (b)(1)-(3)). Clearly, neither the victim nor Facebook have committed a crime here, and no such required probable cause exists to support the issuance of a warrant. To allow or require the People to use a search warrant, unsupported by probable cause, to search and seize records belonging to the victim or Facebook, would wholly violate the Fourth Amendment right against unreasonable search and seizure—a right long protected by this Court and the United States Supreme Court. Penal Code section 1524, and by extension the Fourth Amendment, does not permit a warrant for the materials sought by Touchstone. Thus, a state trial court could not issue a warrant for the victim's records or Facebooks records, even if the SCA applied to Facebook.

D. Due Process Neither Expands or Modifies the Existing Authority the People Have to Obtain a Warrant; It is Limited by Statute

The United States Supreme Court in *Kinsella v. U.S. ex rel. Singleton* (1960) 361 U.S. 234, 246 stated that in relation to Congress' authority to make laws, "[t]his Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments. Due process cannot create or enlarge power. [Citation.] It has to do, as taught by the Government's own cases, with the denial of that 'fundamental fairness, shocking to the universal sense of justice.' [Citation.] It deals neither with power nor with jurisdiction, but with their exercise." Due process relates to fundamental fairness and justice, it does not grant power to the government.

Therefore, due process cannot expand the power of the People to obtain a search warrant, to safeguard Touchstone's Sixth Amendment right. State Law prohibits the intrusion on the victim's electronic communications without a warrant supported by probable cause. The ability to obtain a search warrant for evidence which could be used to impeach a witness at trial, or for evidence to support an affirmative defense, is not a power granted to the People by the legislature. Touchstone's due process right does not command that more powers be conferred to the People. The Sixth Amendment does not compel a grant of power either, since "that right provides no greater protections than the Fourteenth Amendment." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56-57 (lead opn. Of Powell, J.) (*Ritchie*).)

Also, such a fabricated warrant procedure would violate the victim's due process rights. While the language of the California Constitution's Due Process Clause mirrors the Due Process Clause of the United States Constitution, California courts place a higher significance on the dignitary

interest inherent in providing proper procedure. (See *Nozzi v. Housing Authority of City of Los Angeles* (9th Cir. 2015) 806 F.3d 1178, 1191-1198.) "The exclusionary rule has long been a part of both federal and state constitutional procedural due process in criminal cases." (*Governing Bd. v. Metcalf* (1974) 36 Cal.App.3d 546, 548.) There would be no procedural safeguard for the victim if a seizure was made, since exclusion could not be a remedy: Touchstone would be unable to use what was seized by the People.

A warrant is unnecessary, and improper, since the SCA does not apply and state law permits Touchstone to seek a subpoena. A warrant would be both unlawful and contrary to the provisions of the state and federal guarantees of due process.

E. A Court Does Not Have the Inherent Authority to Compel the People to Seek a Warrant, Because It Would Violate the Separation of Powers Provision of the California Constitution

Section 3 of article 3 of the California Constitution provides that "[t]he powers of state government are legislative, executive, and judicial." It further states, "[p]ersons charged with the exercise of one power may not exercise either of the others . . ." (Cal. Const. art. III, § 3.) The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly. (Cal. Const. art. IV, § 1.) The judicial power is vested in all the state courts of this State. (Cal. Const. art. VI, § 1.)

"Subject to the supervision by the Attorney General . . . the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings." (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1387.) The District Attorney serves a "traditional executive authority over the prosecutorial process." (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 77.) As the public prosecutor, the District Attorney "shall attend the courts, and within

his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." (Gov. Code, § 26500.)

The role of the court in the issuance of a search warrant is specific. "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 214.)

If this Court permits a trial court to unilaterally issue a search warrant to search and seize third-party records or orders the People to seek a search warrant, then the trial court has pre-determined sufficient probable cause exists to issue such a warrant without benefit of the requisite affiant to support issuance of that warrant. In normal course, a trial court may not issue a search warrant unless it is supported by an affidavit providing probable cause sufficient to support issuance of that warrant. In effect, the trial court becomes its own affiant for a search warrant it has predetermined is issuable. Such act would be a clear separation of powers. The People's power to exercise discretion would be completely removed. Such a process violated the separation of powers provision of the California Constitution.

III.

A COURT CANNOT COMPEL CONSENT FROM A VICTIM WHO ASSERTS THEIR CONSTITUTIONAL RIGHT TO REFUSE DISCOVERY

A. The Victim Has Objected to Disclosure of His Private Facebook Messages Under Marsy's Law

On February 13, 2018, the victim in this case filed a motion with the Superior Court alleging victim's rights violations, including the Superior

Court order to produce his private messages.[4] On April 18, 2018, the victim appeared before the Superior Court and asserted that the stay of this matter is in violation of his Marsy's Law rights, as it relates to Touchstone's attempt to obtain his private Facebook messages. (Intervenor's Exh. F at p. 5.)

The court subsequently issued an ex-parte minute order, which recognized the victim's motion as a request for the assistance of the People in asserting his rights. (Intervenor's Exh. G.) The court noted that the rights associated with Marsy's Law can be enforced in any trial or appellate court with jurisdiction over the case as a matter of right. (Intervenor's Exh. F; Cal. Const., art. I, § 28, subd. (c), par. (1).) The People therefore now raise the victim's objections to the disclosure of his non-public Facebook content pursuant to his rights under the California Constitution. (Cal. Const., art. I, § 28, subd. (b), par. (5).)

B. Under Marsy's Law, the Victim Has Standing to Object to a Subpoena for Records of Which He Is the Subject

Penal Code section 1326, subdivisions (b) and (c) permit litigants in a criminal action to obtain third party discovery through the subpoena process. When the custodian of records who is subpoenaed is not the subject of the records, the records must be delivered to the clerk of the court pursuant to Evidence Code section 1560, subdivision (b). (Pen. Code, § 1326, subd. (c).) "This restriction maintains the court's control over the discovery process, for if the third party 'objects to disclosure of the information sought, the party seeking the information must make a plausible justification or a good cause showing of the need therefor.'

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[4] The victim also requested money damages from the State of California because of violations of Marcy's Law. The court denied the motion, noting that Marcy's Law does not create a cause of action for damages against the state.

[Citation.]" (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074–1075 (*Kling*), citing *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.)

Marsy's Law gives victims of crime a constitutional right to refuse a discovery request. (Cal. Const., art. I, § 28, subd. (b), par. (5).) A plain reading of Marsy's Law indicates that it is not limited to materials solely in the victim's physical possession, but also any materials in which the victim would otherwise have standing to object. Since a subpoena duces tecum is the mechanism by which litigants obtain third-party discovery, and since the subject of the records has standing to object, it is logical to conclude that victims have a Marsy's Law right to refuse the disclosure of records held by third-parties in which they are the subject. The People also have standing to represent the objections of a victim pursuant to Marsy's Law. (Cal. Const., art. I, § 28, subd. (b), par. (5).)

C. Because a Victim Has a Constitutional Right to Refuse Disclosure, the Court Cannot Easily Avoid a Constitutional Conflict Regarding the Sixth Amendment and the SCA By Simply Compelling Consent

"The doctrine of constitutional avoidance 'command[s] courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.' [Citation.]" (*Voisine v. United States* (2016) 136 S.Ct. 2272, 2290.)

If this Court determines that (1) the SCA applies to Facebook, (2) consent is required for disclosure due to the protections of the SCA, and (3) compelling consent is the only method of obtaining the records without rendering the SCA unconstitutional, this Court would need to hold that the constitutional right of Marsy's Law must yield to both the federal SCA statute and Touchstone's Sixth Amendment guarantees, as applied in this case.

In the context of a civil case, a court may require consent to disclose electronic communications on the pain of discovery sanctions. (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1446.) This would not be consistent with the right the victim has under Marsy's Law to refuse disclosure. "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' [Citation.] In a series of cases beginning with *North Carolina v. Pearce* ..., the [Supreme] Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." (*United States v. Goodwin* (1982) 457 U.S. 368, 372.)

Additionally, a victim is not a party to the criminal case. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451-452.) To impose sanctions on the People for the victim's independent exercise of a constitutional right is misplaced, as they punish the People for an act outside of their control.

Also, if this Court finds that the SCA applies to Facebook, then the victim has an additional right under Marsy's Law Marsy's Law to prevent the disclosure of confidential records. (Cal. Const., art. I, § 28, subd. (b), par. (4).) The SCA clearly provides a right of confidentiality and privacy to users of ECS and RCS providers, if service meets the strict requirements of the Act.

But as explained below, Touchstone has made a tactical decision to withhold the information he believes sustains an as-applied challenge to the SCA. Consequently, the parties are not able to fully litigate whether Touchstone can make a showing that would demand pre-trial disclosure of protected communications.

IV.

THE PEOPLE DO NOT HAVE A *BRADY* OBLIGATION SINCE THE VICTIM IS NOT PART OF THE PROSECUTION TEAM

The duty to disclose under *Brady* is not a discovery rule, but a due process requirement: "The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." (*United States v. Bagley* (1985) 473 U.S. 667, 675.)

A prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the prosecutor—or the prosecution team—knowingly possesses or has the right to possess. (*IAR Sys. Software, Inc. v. Superior Court* (2017) 12 Cal.App.5th 503, 514 (*IAR Sys. Software*).) The prosecution team includes both investigative and prosecutorial agencies and personnel. (*Ibid.*) A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency which assisted the prosecution or the investigating agency in its work. (*Ibid.*)

In *IAR Sys. Software, supra,* (2017) 12 Cal.App.5th at p. 508, the CEO of IAR Systems Software, Inc. was charged with embezzling large sums of money from his corporation. The trial court found that that IAR's attorneys were members of the prosecution team, and the prosecution would have a *Brady* obligation to disclose favorable evidence in their possession. (*Id.* at p. 511.) In support of its order the court relied on "the email correspondence between Valla [IAR's attorney] and law enforcement relating to the hiring of a forensic accountant, and to the identification and exchange of legal authority." (*Ibid.*)

The Appellate Court concluded that the trial court's order was in error, stating that "The fact that these tasks sometimes overlapped with the district attorney's efforts to prosecute defendant, and that Valla cooperated

with the district attorney in its efforts to uncover the truth about defendant's wrongdoing, does not, without more, make them 'team members' for purposes of *Brady*." (*IAR Sys. Software, supra,* 12 Cal.App.5th at p. 522.) The court noted the unique role victims play in the criminal justice system, and the special constitutional rights they are afforded in this state:

> To begin with, we accept petitioners' point that there is no published decision in California or elsewhere holding that a private party that is also a crime victim qualifies as a member of the prosecution team for purposes of *Brady*. Indeed, defendant has directed us to no such case; nor have we found one. This likely reflects two factors. First, as noted above, the *Brady* rule arises from the unique role prosecutors and their agents play in our criminal justice system, which courts have recognized justifies *Brady*'s heightened disclosure requirements. (E.g., *Strickler v. Greene, supra,* 527 U.S. at p. 281, 119 S.Ct. 1936.) However, crime victims and their attorneys, like IAR and Valla, are also uniquely positioned in our criminal justice system. As petitioners point out, the California Constitution affords crime victims certain unique rights, including the right to refuse to cooperate with the prosecution and, of particular significance here, the right "to reasonably confer with the prosecuting agency, upon request, regarding, the arrest of the defendant ... [and] the charges filed...." (Cal. Const., art. I, § 28, subd. (b)(6).)

(*Id.* at p. 517.)

Thus, victims in California are distinguishable from members of the prosecution team because of their rights under Marsy's Law. Although the court limited its ruling to the facts of the case (*IAR Sys. Software, supra,* 12 Cal.App.5th at p. 518), the conclusion is the same here. Unlike IAR's attorneys who proactively supplied evidence, the victim here is actively seeking non-disclosure of his private Facebook messages. Assuming it were ever possible for a victim to become a member of the prosecution team, this victim has done nothing which would put him anywhere remotely close to that status.

Moreover, Facebook is clearly not a member of the prosecution team, playing no role whatsoever in the prosecution or investigation of the underlying case.

The People can neither possess nor suppress items which are out of their reach. Both federal and state law prohibit a government entity from obtaining the victim's private Facebook content without a warrant, as explained above. Further, The United States Supreme Court recently held that the baseline protections of the Fourth Amendment against government intrusion cannot be undermined by the SCA. (*Carpenter v. United States* (2018) 138 S.Ct 2206, 2221-2222 [a warrant is required to obtain a person's cell phone cell-site location data, despite the SCA's provisions which allow a subpoena to obtain such data].) It does not follow that the People would require a search warrant to obtain evidence already in its possession. The fact that the victim's electronic communications are protected against government intrusion is evidence in-and-of-itself that the People do not have constructive possession.

Even erroneously assuming that the victim's private Facebook messages were *in* the People's possession, due process would not be implicated since the actual content of the private Facebook messages remains unknown. In the context of a due process claim that the government failed to preserve an item with unknown exculpatory value, the court in *People v. Von Villas* (1992) 10 Cal. App. 4th 201, 241 stated, "... [t]he mere possibility that an item of undisclosed evidence might have helped the defense or might have affected outcome of trial does not establish its materiality in a constitutional sense. [Citations.]" Certainly, a victim who asserts an independent constitutional or statutory right to withhold evidence, of unknown inculpatory or exculpatory value to either party, would not implicate due process.

V.

TOUCHSTONE HAS MADE A TACTICAL DECISION TO REFUSE DISCLOSURE OF INFORMATION NECESSARY TO ADDRESS AN "AS-APPLIED" CHALLENGE TO THE SCA; HE CANNOT LITIGATE THIS ISSUE "EX PARTE"

A. A Brief Overview of United States Supreme Court and California Supreme Court Caselaw Which Addresses the Conflict Between a Witness' Right of Privilege of Confidentiality and a Criminal Defendant's Sixth Amendment Right to Cross Examine

The Unites States Supreme Court in *Davis v. Alaska* (1974) 415 U.S. 308, 318 (*Davis*) held that when a criminal defendant was not permitted to call into question the reliability of a witness because of his probation status, his right of effective cross-examination was denied, which was "an error of the first magnitude and no amount of showing of want of prejudice would cure it. [Citations.]" The court held, "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." (*Id.* at p. 320.)

In a subsequent United States Supreme Court Case, *Pennsylvania v. Ritchie*, the defendant was charged with the sexual abuse of his daughter. (*Ritchie, supra*, 480 U.S. at p. 43.) Pretrial, the defendant served the Department of Children and Youth Services (CYS) with a subpoena, seeking access to records concerning his daughter. (*Ibid.*) CYS refused to comply on the grounds that the records were privileged under state law. (*Ibid.*) The trial court refused to order CYS to disclose the records, and the defendant was ultimately convicted by jury verdict on all charged counts. (*Id.* at p. 44.)

The Court, in its plurality opinion, held that, although there is a strong public interest in protecting sensitive information (the CYS records

in question), it does not prevent disclosure in all circumstances. (*Id.* at p. 57.) The Court reasoned that, since an exception to the confidentiality statue allowed a court to order CYS to disclose the confidential records, the defendant was entitled to a review of that file for materially exculpatory evidence. (*Id.* at pp. 57, 61.) The Court stated, "We find Ritchie's interest . . . in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for an *in camera* review."[5] (*Id.* at p. 60.)

In *People v. Reber* (1986) 177 Cal.App.3d 523 (*Reber*), the Court of Appeal applied *Davis's* holding regarding the confrontation clause to the pretrial discovery of subpoenaed mental health records. *Reber* noted that *Davis* dealt with the right of confrontation at trial, whereas *Reber* involved pretrial discovery, but such a distinction was "one without a difference." (*Reber, supra,* 177 Cal.App.3d at p. 531.)

The California Supreme Court in *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*) disapproved of *Reber's* analysis and held that *Davis* dealt with a Defendant's trial rights only and did not compel pretrial discovery of privileged materials. (*Id.* at pp. 1126-1127.) However, the court did rule that a trial court may have to balance the interests of cross examination against the privilege and determine whether disclosure is required to ensure a defendant's right to confrontation is not violated. (*Id.* at p. 1127.)

In *Hammon*, the defendant was charged with sexual molestation of his foster child. He served a pretrial subpoena duces tecum on psychotherapists who treated the victim. The Supreme Court held that the

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[5] In this brief, the People refer to the right in question as the Sixth Amendment right to cross-examine because it best describes the practical purpose of Touchstone's subpoena, which is to obtain materials to use in cross-examination at trial.

trial court properly quashed a subpoena duces tecum the defendant served on psychotherapists treating the alleged victim without first conducting an *in camera* review of the material. The court held,

> ... When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis,* to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. [Citation.] Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily.

(*Hammon, supra,* 15 Cal.4th at p. 1127.)

Although the court in *Hammon* held that the confrontation clause does not confer a right to pretrial discovery of privileged information, the court did explain that a trial court may have to conduct an *in camera* review of the privileged records to balance the interests of the defendant's right to cross-examine against the interests the privilege aims to protect. Such a balancing can only be intelligently conducted by the trial court, after such time as the competing interests may be fully understood. This is to avoid prematurely and unnecessarily resolving a conflict between competing rights until absolutely necessary to do so and as a last resort

B. The Sixth Amendment Is Not a Right to Pre-trial Discovery but a Trial Right; a Substantial Showing Must Be Made If Pre-trial Disclosure Is the Only Remedy to Secure That Right

If this Court finds that the electronic communications in question are protected by a right of confidentiality, either due to the SCA or state law, Touchstone must make a substantial showing that pre-trial disclosure is necessary to ensure that his right to cross-examine will be safeguarded at his pending trial. As stated in *Hammon,* a defendant's access to privileged information must await a showing of materiality during trial, with the trial court balancing the defendant's need for cross-examination against the

policies the privilege intends to serve. (*Hammon, supra,* 15 Cal.4th at p. 1127.)

The court in *Hammon* expressed concern that pretrial disclosure of privileged materials of a witness may be unnecessary, when, during trial, the information is revealed through other means, or other evidentiary developments during trial undermine the need to disclose. The court in *Hammon* stated,

> The facts of the case before us illustrate the risk inherent in entertaining such pretrial requests. Defendant sought disclosure of Jacqueline's psychotherapy records on the theory that such "records [would] provide evidence of the existence or nonexistence of said molestations .... [and would be] necessary to prove the victim's lack of credibility, her propensity to fantasize and imagine events that never occurred." In fact, defendant at trial admitted engaging in sexual conduct with his foster daughter, thus largely invalidating the theory on which he had attempted to justify pretrial disclosure of privileged information. Pretrial disclosure under these circumstances, therefore, would have represented not only a serious, but an *unnecessary*, invasion of the patient's statutory privilege (Evid. Code, § 1014) and constitutional right of privacy (Cal. Const., art. I, § 1; see *People v. Stritzinger* (1983) 34 Cal.3d 505, 511-512 [recognizing the psychotherapist-patient privilege as an aspect of the privacy right]).
>
> Similar concerns surfaced in *People v. Reber*, *supra*, 177 Cal.App.3d 523. After concluding the trial court erred in failing to review the victims' psychological records in camera, the *Reber* court went on to find the error harmless. It was harmless, the court determined, for two reasons: The jury learned about the victims' psychological history through other evidence, and the physical evidence negated the defendants' theory the victims had fantasized the assaults. (*Reber*, *supra*, 177 Cal.App.3d at p. 532.)

(*Hammon, supra,* 15 Cal.4th at pp. 1127–28.)

If Touchstone is asking this court to find that pre-trial disclosure is necessary in lieu of a determination after the victim has testified, he is essentially asking this court to overrule *Hammon* because the facts of this case warrant it. The court should not entertain this request unless Touchstone is willing to disclose to the Parties the information he claims demands such an outcome.

C. The Court Should Not Overrule *Hammon*, Since Touchstone Refused to Provide the Facts Which He Believes Supports Pre-trial Disclosure

In support of his motion to quash, Touchstone filed portions of his counsel's declaration under seal, to avoid disclosing to the People their trial strategy. The People therefore cannot adequately litigate whether he has made the substantial showing which would convince this court to overrule *Hammon*.

General claims of "attorney work-product" or "strategy" cannot be used by Touchstone to engage in an ex-parte consideration of a subpoena duces tecum. (*Kling, supra*, 50 Cal.4th at p. 1078.) The People have standing not only to litigate the impact disclosure has on the victim's rights under Marsy's Law, but also to address the propriety of a third-party subpoena in general. (*Kling, supra* 50 Cal.4th at pp. 1078–79.) The People cannot meaningfully litigate the issue if Touchstone insists on secrecy.

Touchstone must choose between pursuing his goal of obtaining the victims private Facebook content versus his desire to have the element of surprise at trial. "Although '[t]he criminal process ... is replete with situations requiring the 'making of difficult judgments' as to which course to follow ... [and] ... a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.' " (*People v. Bryant, Smith & Wheeler*, 60 Cal.4th 335, 368, citations omitted.) If

somehow Touchstone's Sixth Amendment right would be violated by denying him the victim's private Facebook messages, it is his choice if he wishes to forego the enforcement of that right in favor of trial strategy. But, matters involving privileges or confidentiality rights of victims and whether they should yield to a constitutional right of a defendant should not be litigated under a shroud of secrecy.

CONCLUSION

The People respectfully request that this Court find that the SCA does not apply to Facebook and deny Facebook's motion to vacate the Superior Court's order. Additionally, the People request that this court address and define which of the victim's Marsy's Law rights apply and remand the matter back to the Superior Court to balance those rights against Touchstone's rights. Further, the People request that this Court hold that Touchstone should be required to disclose all information which he believes supports disclosure, if he wishes to continue to seek enforcement of the subpoena. Lastly, the People request this Court hold that a court-ordered search warrant remains an improper and illegal vehicle to seize records belonging to or held by non-criminal third parties like the victim and Facebook. A trial court may not order or compel a prosecutor to obtain and execute a search warrant as that is an action beyond the court's authority and not authorized by state search warrant laws, the Fourth Amendment of the United States Constitution, or by any guarantees of due process.

Dated: July 25, 2018

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I certify that this **SAN DIEGO COUNTY DISTRICT ATTORNEY INTERVENOR BRIEF** including footnotes, and excluding tables and this certificate, contains 9,888 words according to the computer program used to prepare it.

KARL HUSOE
Deputy District Attorney

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, Respondent.	For Court Use Only
LANCE TOUCHSTONE, Real Party In Interest.	Supreme Court No.: S245203 Court of Appeal No.: D072171 Superior Court No.: SCD268262

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On July 25, 2018, a member of our office served a copy of the within Letter of **SAN DIEGO COUNTY DISTRICT ATTORNEY INTERVENOR BRIEF** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope in FEDEX drop box, addressed as follows:

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Law Office of Donald E. Landis, Jr. P.O. Box 221278 Carmel, CA 93922	John T. Philipsborn Law Offices of J.T. Philipsborn Civic Center Building 507 Polk Street, Suite 350 San Francisco, CA 94102

I electronically served the same referenced above document to the following entities:

ATTORNEY GENERAL'S OFFICE: AGSD.DAService@doj.ca.gov
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I also served the following parties electronically via www.truefiling.com:

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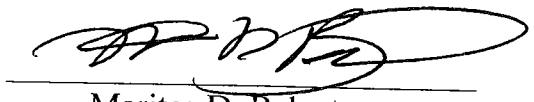
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 25, 2018 at 330 West Broadway, San Diego, CA 92101.



Marites D. Balagtas